CAPT. MUSTAPHA ABDULLAH

v.

BRIGADIER GENERAL ABDUL MANAP IBRAHIM & ORS.

HIGH COURT BORNEO
CHONG SIEW FAI J
[ORIGINATING MOTION NO. 2 OF 1986]
4 MARCH 1988

ARMED FORCES: *Court Martial - Order for prohibition from holding a Court Martial - Whether application was subject to armed forces law - Whether failure by commanding officer to investigate charges fatal - Whether applicants rights in respect of his arrest complied with.*

The applicant applied for an order of Prohibition prohibiting the Court Martial from being convened to hear and try 11 charges against the applicant and doing so he relied on 3 grounds:

[1] The Court Martial has no jurisdiction to hear the charges against the applicant since he is no longer subject to armed service law as he was only charged after the prescribed period provided under s. 144(3) of the Armed Forces Act 1972 had lapsed or expired.

[2] The Court Martial has no jurisdiction to hear the charges against the applicant since his commanding officer had not investigated the charges.

[3] Provisions of Article 5 of the Federal Constitution and ss. 93 and 174(4) of the Armed Forces Act were not complied with in respect of the arrest of the applicant.

Held:

[1] That in respect of the first ground it was clear on the facts that the applicant's retirement from the Armed Forces was subject to the approval of the Yang di-Pertuan Agong and as no such approval had been given the applicant's service with the Armed Forces had not been terminated year as such the applicant was subject to military law.

[2] The third ground relied on by the applicant was devoid of merit on the basis that it was settled law that even if the arrest was illegal or not in accordance with the law [which was not decided] this in itself would not affect the jurisdiction of the Court Martial to try the applicant.

[3] In respect of the second ground of motion on the evidence it was clear that the Commanding Officer did not personally investigate the charges against the applicant. However it was clear that one Captain Azman had investigated the charges against him. There was power under reg. 8(1) read with reg. 12 of the Armed Forces [Summary Jurisdiction] Regulations 1976 for the Commanding Officer to delegate its power to another officer to delegate its power to another officer but in the instant case this was limited to 4 out of the 11 charges against the applicant. As such an order of Prohibition would lie against the remaining 7 charges against the applicant.

[Order accordingly.]

Cases referred to:

Saw Kim Hai v. R [1956] MLJ 21
Saminathan v. Public Prosecutor [1937] MLJ 39
Dr. A. Dutt v. Assunta Hospital [1981] 1 MLJ 304
R. v. Local Government Board [1882] 10 QBD 309

Legislation referred to:
Armed Forces (Court Martial) Rules of Procedure 1976, rr. 36(1), 52, 61(1)
Armed Forces Act 1972, ss. 20(2), 30(1), 47, 48, 54(1)(a), 77(a), 85, 93(2), (5), 95, 96, 97, 98, 144(3), 174(4), 209(1)
Armed Forces (Summary Jurisdiction) Regulations 1976, reg. 8(1), 12
Federal Constitution, art. 5(1)
Regular Forces (Pensions, Gratuities and Other Benefits) Regulation 1982, reg. 20(2), (2)(a)
Rules of the High Court 1980, O. 53 rr. 1(2), 3(1), (2)

JUDGMENT

Chong Siew Fai J:

By an originating motion the applicant applies to this Court "for an order of Prohibition prohibiting the Court Martial from being reconvened to hear and try the charges against the applicant."

Originally 5 grounds were stated in support of the motion. At the hearing 2 were abandoned and 2 were amended or, rather, having parts thereof forsaken. The grounds finally relied on at hearing are as follows:

(1) The Court Martial has no jurisdiction to hear charges against the applicant since he is no longer subject to armed service law as he was only charged after the prescribed period provided under s. 144(3) of the Armed Forces Act, 1972 had expired or lapsed.

(2) The Court Martial has no jurisdiction to hear the charges against the applicant since his Commanding Officer has not investigated the charges.

(3) Provisions of Article 5 of the Federal Constitution and ss. 93 and 174(4) of the Armed Forces Act 1972 were not complied with in respect of the arrest of the applicant.

A document dated 25 September 1985 was produced on behalf of both the applicant and the respondents. In the affidavit of the applicant made on 24 November 1986 it was marked as Exh. "MC" and in the affidavit of Lt. Col. Abdul Halim made on 21 September 1987 it was marked as Exh. "AH1". Both parties had their own translation thereof in the English language with slight variations in some of the words. Because of that, by consent of both parties, the Senior Court Interpreter of the High Court, Sibu, was called. In his evidence the Court Interpreter testified that the word "perkenan" means consent or permission and the word "ditetapkan" means "be ended". I accept the evidence as correct.

In order that the background of the case may be better understood, it may be useful to relate some of the undisputed facts.

The applicant was captain serving in the Armed Forces. A letter dated 25 September 1985 signed on behalf of the Chief of the Armed Forces concerning the service of the applicant in the Forces was issued. (Exh. "MC" annexed to the applicant's affidavit made on 6 November 1986). The certified translation (into English) of the relevant part of the letter reads as follows:

> Premature Retirement
>
> Capt. Mustapha bin Abdullah (3001304) JLJ.
>
> Ref: A KP (S) 53 Jil 37 (103) dated 3 August 1985.
>
> 1. I am directed to inform that subject to the blessing of His Majesty the Yang di-Pertuan Agong the Armed Forces Council No. 243 at its meeting on 1 August 1985 had approved the premature retirement of Captain Mustapha bin Abdullah (3001304) JLJ pursuant to r. 20(2)(a) of the permanent Army Rules (Pension, Gratuity and other benefits) 1982.

2. He is to be given pension and service gratuity under r. 22(2)(a) of same Rules.

3. He is permitted to attend resettlement course of 6 moths as from 1 September 1985 to 28 February 1986.

4. His service ends on 1 March 1986.

5. Do inform officer concerned.

The correct citation of the 1982 Rules mentioned in para. 1 of the letter above should be the "Regular Forces (Pensions, Gratuities and Other Benefits) Regulations 1982."

It is to be noted under the letter Exh. "MC" the premature retirement of the applicant was subject to the consent of His Majesty the Yang di-Pertuan Agaong and that the applicant was to undergo resettlement course or training for 6 months from 1 September 1985 to 28 Februrary 1986.

By letter (Exh. "AH2" annexed to Lt. Col. Abdul Halim's affidavit made on 21 September 1987) the address at which the applicant was to receive resettlement training as project supervisor was Diman Kontractor Bersaudara, No. 27, Tingkat 1, Kg. Nyabor, Diman Hotel, Sibu, Sarawak.

By Circular No. 1 of 1981 (Exh. "AH3" annexed to Lt. Col. Abdul Halim's affidavit made on 21 September 1987) certain terms and conditions to be observed by Resettlement Personnel were given. Amongst these were that in the course of the resettlement training, the trainees had to obey certain laws, orders, directives, circulars and regulations specified in item 4.1 of the circular; they were not allowed to change the place and type of the approved resettlement training without written approval (item 3.10); except on compasionate grounds and with approval, they were not allowed to take leave (item 5.1); at the end of the resettlement training, they had to present themselves for final interview with a view to ascertaining future planning (item 7.1) (See also paras. 6 and 7 of Lt. Col. Abdul Halim's affidavit made on 21 September 1987).

The evidence shows that the applicant absented himself from the place of resettlement training at Sibu and it is not disputed that he was arrested at Kubang Krian Kota Bahru on 5 August 1986. (See paras. 6, 7 and 8 of Mukhtar bin Ismail's affidavit made on 21 September 1987).

There is no clear evidence as to the exact date of the applicant's absence from the place of the resettlement training. However, Mejar Basry deposed that sometime in December 1985, he could not find the applicant at the approved place of resettlement of training at Sibu, nor at the applicant's rented premises; and the notes left at the applicant's rented premises requiring him (the applicant) to report to the deponent met with no response. (Paragraphs 5 and 6 of Basry's affidavit made on 28 September 1987).

The affidavit evidence of Othman bin Kawi affirmed on 24 November 1986 and adduced by the applicant himself establishes that prior to 4 January 1986 the applicant had left for West Malaysia. On the evidence it is clear, and I so hold, that the applicant on some unknown date prior to 4 January 1986 had left for West Malaysia without the necessary approval of the appropriate authority.

I also find that there is no evidence of the grant of consent for the early retirement of the applicant by His Majesty the Yang di-Pertuan Agong.

On 14 October 1986 the Court Martial of the applicant began. 11 charges were brought against him. After the objection of applicant that the Court Martial had no jurisdiction to try him was overruled, the trial was adjourned *sine die* pending determination of this Court on an

application to be made by the applicant. However, subsequently, a move was made to continue with the Court Martial. Hence this application.

Exhibit "MB" annexed to the applicant's affidavit made on 6 November 1986 shows that of the 11 charges: 5 are under s. 4(c) of the Prevention of Corruption Act 1961, 4 are under s. 77(a) of the Armed Forces Act 1972, one each under s. 85 and s. 54(1)(a) of the said 1972 Act.

I shall now deal with ground (1) of the motion.

For the applicant it was contended that by virtue of reg. 20(2) of the Regular Forces (Pensions, Gratuities and Other Benefits) Regulations 1982 ("the 1982 Regulations") the Armed Forces Council had the power to terminate the applicant's service in the Armed Forces, that by the letter dated 5 September 1985 (Exh. "MC" annexed to the applicant's affidavit made on 6 November 1986), the applicant had retired from the Armed Forces on 1 March 1986, that therefore the applicant was no longer subject to service law and could not be tried by Court Martial which began on 14 October 1986. Reliance was placed on s. 144(3) of the Armed Forces Act 1972 and reg. 20(2) of the 1982 Regulations. The relevant part of s. 144(3) of the Armed Forces Act reads:

> (3) A person shall not be triable by virtue of subsection (1) of s. 143 unless his trial is begun within three months after he ceases to be subject to service law, or the trial is for a civil offence committed outside the Federation and the Public Prosecutor consents to the trial: Provided that this subsection shall not apply to an offence against s. 47 or s. 48 or desertion.

It may be noted from the proviso that a charge of the offence of desertion is not affected by the above subsection.

Regulation 20(2) of the 1982 Regulations provides:

> (2) The Yang di-Pertuan Agong may require an officer to retire from the service -
>
> (a) on or after attaining the optional age of retirement appropriate to his rank as follows:

	Age in Years	
Rank	**Male**	**Female**
(i) General/Special Duty List		
Kolonel and above	50	45
Leftenan Kolonel....	47	45
Mejar	45	40
Kapten and below..	45	40
(ii) Professional Duty List		
All ranks	50	45

> (b) Under special circumstances if he is of the rank of Brigadier General or above even though, he has not reached the compulsory age of retirement stipulated in para. (1) or optional age of retirement stipulated in sub-paragraph (a) above;
>
> (c) on medical grounds if he is certified by a Medical Board to be incapable of discharging the duties of his office, by reason of an infirmity of mind or body which is likely to be permanent, whether attributable to service or otherwise;
>
> (d) for lack of suitable employment or lack of promotion prospect or supersession due to unsuitability or inefficiency not within his own control; or
>
> (e) for inefficiency or other causes within his own control but not amounting to misconduct; or

(f) in the interest of the service on being charged with an offence which does not result in his conviction; or

(g) for misconduct; or

(h) at any time should the circumstances of the case in the opinion of the Yang di-Pertuan Agong require it.

With respect, the contentions, in my opinion, fail. Persons who are "subject to service law" are specified in s. 209(1) of the Armed Forces Act 1972. It is not disputed that up to 28 February 1986 the applicant was subject to service law, his contention being that he was no longer subject thereto as from 1 March 1986 by virtue of the letter dated 25 September 1985 (Exh. "MC") referred to above. The question therefore is: Had the letter Exh. "MC" (or Exh. AH1") the effect of ending or retiring the service of the applicant in the armed forces? If it had as contended by the applicant, the by virtue of s. 144(3) of the Armed Forces Act 1972 he would not be triable by Court Martial which began on 14 October 1986. It would be otherwise if it had not such effect.

In my opinion the letter Exh. "MC" (or Exh. "AH1") did not have the effect of ending or retiring the applicant's service in the armed forces. It is a letter concerning the matter of the premature retirement of the applicant expressly stated to be in pursuance of reg. 20(2)(a) of the 1982 Regulations. The opening sentence of the said reg. 20(2) states: "The Yang di-Pertuan Agong may require an officer to retire from the service ..." Furthermore, the letter Exh. "MC" (or Exh. "AH1") expressly stated: "... subject to the blessing (consent) of His Majesty the Yang di-Pertuan Agong" which is clearly in line with the provisions of the said reg. 20(2) quoted above.

For the applicant, emphasis was laid on the sentence: "4. Tarikh Tamat Perkhidmatan Pegawai ditetapkan pada 01 Mac 86."

In my opinion this sentence must be read having regard to and in the context of the letter as a whole, particularly the requirement of the consent of His Majesty the Yang di-Pertuan Agong and the reference to the said reg. 20(2)(a) of the 1982 Regulations therein stated. In my view it is clear that the letter was a conditional approval, conditional upon the consent of His Majesty the Yang di-Pertuan Agong being granted. Since there is no evidence that the consent had been granted or obtained, the letter did not have the effect of putting an end to the service of the applicant.

For the applicant it was contended by reference to Exh. "AH6" dated 24 September 1986 (tendered at the trial by consent of parties) that the applicant's retirement from 1 March 1986 was valid till 24 September 1986 when it was withdrawn. I reject the contention. Although Exh. "AH6" states": "By virtue of ref. a, the Army Council had approved the optional retirement ... on 1 March 1986 ", as can be clearly seen that statement was on the strength of "ref. A "which Exh. "MC". I have held, for reasons given above, that Exh. "MC" did not effectually terminate the service of the applicant. Exh. "AH6" does not help the situation. In fact para. 1 of Exh. "AH6" made reference to the termination order having "been extended *vide* ref. B" and para. 4 thereof cancel, amongst other things, that order of extension. Paragraph 2 of Exh. "AH6" not only spoke about postponement of the applicant's retirement date on 1 March 1986 until further notice but also the revocation of his resettlement training with effect from the date of his absence without leave.

In short, it is my view that Exh. "MC" did not end the service of the applicant on 1 March 1986 or at all. I also reject the contention for the applicant that the applicant's retirement form 1 March 1986 was withdrawn *vide* Exh. "AH6" on 24 September 1986. Such contention

assumes the validity of the retirement from 1 March 1986, and I have held that Exh. "MC" did not in effect retire the applicant from the armed forces. There is further ground debarring the applicant from claiming entitlement to be discharged from the armed forces by virtue of the letter Exh. "MC" or Exh. "AH1".

It is not disputed that during the period resettlement training from 1 September 1985 to 28 February 1986 the applicant was subject to service law. On the evidence in the affidavits of Lt. Col. Abdul Halim affirmed on 21 September 1987, of Mejar Basry bin Adam affirmed on 28 September 1987 and of Othman bin Kawi affirmed on 24 November 1986 relating to the absence of the applicant from the appointed place of resettlement training and his subsequent arrest at Kubang Krian Kota Bahru on 5 August 1986, all of which I have mentioned earlier, the applicant clearly had at some unknown time before 4 January 1986 left the appointed place of resettlement training without any or any proper approval whilst subject to service law. By such conduct the applicant would at least be reasonably suspected of having committed desertion for which he was liable to be and was in fact charged. Under s. 30(1) of the Armed Forces Act, he was not entitled to be discharged. The proviso to the said s. 30(1) would not apply since, on the facts, the applicant was put on trial by Court-martial for the alleged offence. It may also be noted that out of the 11 charges brought against the applicant, the 7th and 8th charges (see Exh. "MB" annexed to the applicant's affidavit made on 6 November 1986) were allegedly having been committed on 11 October 1985 i.e., after the date of the letter Exh. "MC" or Exh. "AH1".

I hold that ground (1) of the motion fails.

I shall now consider ground (3) of the motion.

The complaint under ground (3) of the motion was that the arrest of the applicant was unlawful in that it contravened:

(1) Section 93(2) of the Armed Forces Act in that the arrest was effected by a staff sergeant i.e., an officer beyond the rank of that of the applicant who was a captain.

(2) Section 174(4) of the Armed Forces Act in that the applicant was not produced before a magistrate when the said s. 174(4) required such production within 24 hours of the arrest.

It was further contended that there had therefore been violation of Article 5(1) of the Federal Constitution which provided that "No person shall be deprived of his life or personal liberty save in accordance with law."

For the respondents, it was submitted that the arrest was made on the order of a provost officer under s. 93(5) of the Armed Forces Act and subsection (2) thereof had no application. It was also contended that the provisions of arrest applied to the commission of all offences against any a provision of the Armed Forces Act including that of desertion and the production of the arrestee before a magistrate was not necessary because s. 93 did not specify such requirement.

For the purpose of this motion, I find it unnecessary to determine the issues because, as conceded by Counsel for the applicant, it is settled law that even if the arrest was illegal or not in accordance with law (which I am not deciding), this in itself would not affect the jurisdiction of the Court to try the applicant. See *Saw Kim Hai v. R.* [1956] MLJ 21, *Saminathan v. Public Prosecutor* [1937] MLJ 39.

Accordingly, this ground is devoid of merit.

I now come to the second ground of the motion. Here the applicant disputed the jurisdiction of the Court-martial on the ground that the commanding officer of the applicant did not investigate the charges brought against him (the applicant).

It is not in dispute that in relation to this ground of the motion the commanding officer of the applicant at till material times was Mejar Abdul Rashid bin Sujan (see paras. 2 and 3 of Mejar Abdul Rashid's affidavit made on 28 September 1987).

Section 95 of the Armed Forces Act 1972 provides:

> Before an allegation against a person subject to service law under this Act (hereinafter referred to as "the accused") that he has committed and offence against any provision of this Part is further proceeded with, the allegation shall be reported, in the form of a charge, to the accused's commanding officer, and the commanding officer shall investigate the charge in the prescribed manner.

As indicated earlier, the complaint of the applicant was that his commanding officer had not investigated the charges against him (the applicant). This he did in:

(a) ground (2) of the *ex-parte* Originating Motion herein dated 10 November 1986;

(b) ground (2) of the originating motion herein dated 2 December 1986 (as amended at the hearing); and

(c) paragraph 10 of his affidavit made on 24 November 1986.

In para. 3 of his affidavit made on 24 November 1986 in support of the motion, the applicant stated that at the hearing of the motion he would refer to his affidavit made on 6 November 1986 in support of his *ex-parte* application for leave for its full terms and effect. In para. 3(b) of the applicant's affidavit made on 6 November 1986 in support of the *ex-parte* originating motion, the applicant also contended to the effect that his commanding officer did not investigate the charges.

In the face of the assertions, the commanding officer Mejar Abdul Rashid made no denial. Nor did he state that he had himself investigated. Furthermore, para. 8 of Lt. Col. Abdul Halim's affidavit made on 21 September 1987 also tends to support that the commanding officer did not himself investigate.

On the evidence, I come to the conclusion that the applicant's commanding officer did not personally investigate the charges against the applicant. The argument in this Court that he did so investigate is not supported by evidence, and I reject it.

However, this does not conclude the matter. In para. 3(b) of his affidavit made on 6 November 1986, the applicant deposed:

> (b) I am advised that in a case like mine the charges should have been investigated by my Commanding Officer in this case the second respondent. Instead investigations were carried out by Captain Asman bin Mohd. Yusof ...
> (Underlining added).

In para. 10 of his affidavit made on 24 November 1986 the applicant said:

> 10 ...
>
> In law only my Commanding Officer Major Abdul Rashid bin Sujan (411382) could investigate the charges against me. He could only delegate his power to Captain Azman to cause evidence to be reduced in writing but not the power to investigate. Major Abdul Rashid bin Sujan not only did not investigate the charges against me but also could never and indeed never delegate such power to Captain Azman.

From the above affidavit evidence, it is clear that the applicant admitted that Captain Azman had investigated the charges against him, and that his contention, however, was that only the commanding officer himself could investigate and that he could not delegate such power or delegate such power to Captain Azman.

In answer to para. 3(b) of the applicant's affidavit made on 24 November 1986, Lt. Col. Abdul Halim in para. 8 of his affidavit made on 21 September 1987 said:

> 8 ...
>
> I am also advised that under the same rules, the Commanding Officer may delegate the conduct of the investigation to an other officer. I therefore humbly submit that in the applicant's case, the Captain Azman bin Mohd. Yusof (3000596) has been properly delegated to investigate the offence and took abstract of evidence against the applicant. Therefore, the investigation was lawfully done and was done in accordance with existing rules and provisions of the law.

In reply to the said para. 8 immediately quoted above, the applicant in para. 5 of his affidavit made on 30 December 1987 said:

> 5. From para. 8 of the said Affidavit it is clear that my Commanding Officer never investigated the charges against me for all that he did was instructed one Captain Azman bin Mohd. Yusof to take the abstract of evidence and this cannot be equated with investigation.

Now, I would make two observations respecting this para. 5. Firstly, this reply with reference to para. 8 of Lt. Col. Abdul Halim's affidavit is not quite correct in so far as contending that all the commanding officer did was instructing Captain Azman to take the abstract of evidence for in the said para. 8 Lt. Col. Abdul Halim had clearly deposed about delegating investigation to Captain Azman. Secondly, and more importantly, this contention of the applicant runs counter the clear admission his own affidavit made on 6 November 1986 that investigations were carried out by Captain Azman. In this connection, I am also aware that in para. 4 of the commanding officer Mejar Abdul Rashid's affidavit made on 28 September 1987 there was no mention of instructing Captain Azman to investigate. But this in my opinion, is not sufficient ground for holding against the respondents because -

(1) the said para. 4 was in answer to para. 3(b) of the applicant's affidavit made on 6 November 1986, and

(2) in the said para. 3(b), the applicant had admitted that investigations had been carried out by Captain Azman, his complaint being that the commanding officer himself should investigate.

On his own admission, the applicant cannot be heard to say that Captain Azman bin Mohd. Yusof had not investigated the charges against him. The evidence points to the conclusion that the captain had so investigated.

For the applicant it was contended that the commanding officer did not delegate the power of investigation to Captain Azman. It will be noted that this is not a ground stated in the statement filed pursuant to O. 53 r. 1(2). The seeming statement of the applicant that the power to investigate was not so delegated appearing in para. 10 of the applicant's affidavit made on 24 November 1986 was change of ground or an additional ground for which no leave of Court was sought or obtained (O. 53 r. 3(1) and (2)). With respect, rules, are to be observed and an applicant should not be allowed to roam at large, outside its proper confines. (See the observations in *Dr. A. Dutt v. Assunta Hospital* [1981] 1 MLJ 304).

Furthermore, in answer to the point raised by the applicant that the investigations were carried out by Captain Azman (see para. 3(b) of the applicant's affidavit made on 6 November 1986), Lt. Col. Abdul Halim said that the captain had been properly delegated to investigate (see para. 8 of his affidavit made on 21 September 1987). Against this assertion of the Lt. Col., there is no rebuttal directly in point. Paragraph 5 of the applicant's affidavit made on 30 December 1987 dealt with the captain making abstract of evidence and therefore does not answer in point. In short, the alleged non-delegation of power to Captain Azman to investigate the charges is not one of the grounds stated in the statement filed under O. 53 r. 1(2). But even if this ground may be advanced, it has been refuted in the affidavit of the Lt. Col. against which there was no rebuttal. The contention therefore must fail.

The central issue is: Could the commanding officer, in law, delegate the task of investigation? Or must he personally investigate? As no argument was advanced by either side on this important question at the initial hearing, I invited Counsel on both sides to address me thereon. After hearing their submissions and after considering the matter, I am of the view that delegation is permissible. Under reg. 8(1) of the Armed Forces (Summary Jurisdiction) Regulations 1976, the commanding officer had the authority to delegate the power to investigate charges.

A further question, however, is: Could the commanding officer, in law, delegate the power of investigation respecting all the 11 charges? The answer lies in reg. 8(1) read with reg. 12 of the Armed Forces (Summary Jurisdiction) Regulations 1976. The said reg. 8(1) provides for delegation of powers by commanding officers. So far as is relevant, it reads:

> 8. (1) ..., an officer who is a commanding officer within the meaning of reg. 4, 5 or 6 may delegate to a subordinate commander, whatever his rank may be, who is under his command and directly responsible to him in disciplinary matters, the power to investigate and deal summarily with charges with which he himself may so deal under reg. 12:
>
> Provided that such delegation shall not include (a) .....
>
> ... and (b) the power to order the taking of a summary of evidence or the making of an abstract of evidence.

The said reg. 12 provides:

> 12. A commanding officer or an appropriate superior authority may deal summarily with a charge under any of the following sections of the Act: 44, 46(e), 49, 50(2), 51, 52, 55, 56, 57, 58, 59(1)(a), 60, 61(c) and (d), 62(c), 63, 64, 65(2), 66, 67, 72, 77(a) and (b), 81(b), 86 (where the principle offence can be dealt with summarily by virtue of this Regulation); 87 and 88 (where the civil offence is one which is specified in the Second Schedule to these Regulations).

It is clear that in respect of the 11 charges against the applicant, the commanding officer could in law delegate to Captain Azman the power to investigate the 4 charges under s. 77(a) of the Armed Forces Act 1972 (i.e., the 2nd, 4th, 6th and 8th charges in Exh. "MB" annexed to the applicant's affidavit made on 6 November 1986) but not the other 7 charges.

My attention was drawn to the proviso to reg. 8(1) of the said 1976 Regulations to the effect that the delegation could not include the power to order the making of abstracts of evidence. In respect, Counsel for the respondents pointed out that the matter excluded for delegation was "the power to order" as opposed to the power of making abstracts of evidence which, under r. 36(1) of the Armed Forces (Court-Martial) Rules of Procedure 1976, may be made by another officer directed by the commanding officer. The view seems to me to be correct.

On the evidence and materials before me, I hold that prohibition does not lie in relation to the 4 charges under s. 77(a) of said Act. The motion, to that extent, therefore fails.

As regards the remaining 7 charges, they could not be dealt with summarily by the commanding officer himself under reg. 12 of the Armed Forces (Summary Jurisdiction) Regulations 1976 and therefore could not in law be validly delegated for purpose of investigation. Investigation of those 7 charges by the captain is therefore bad.

The next question is: Since there had been no investigation by the commanding officer and no valid investigation by Captain Azman respecting the 7 charges, should prohibition lie respecting thereof?

In response to my question on this point, at the initial hearing, though somewhat differently phrased, Encik Abdul Aziz of Counsel for respondents, whilst recognising the tendency of the Courts demonstrating a marked reluctance from seeming to interfere with the proceedings of military authorities, nevertheless, candidly conceded that prohibition ought to lie after making references to ss. 95, 96, 97, 98 and 130 of the Armed Forces Act 1972 and rr. 52 and 61(1) of the Armed Forces (Court-Martial) Rules of Procedure 1976 and the consequences thereof that could have ensued in favour of the applicant such as dismissal of charges, having the charges dealt summarily, the necessity of speedy investigation and want of jurisdiction on the part of the court-martial owing to non-investigation. With the view of Counsel, I am inclined to agree.

Also where part only of a party's request for a prohibition proves to be well founded, and the matter is divisible, the Court may grant prohibition in respect of that part. *R v. Local Government Board* [1882] 10 ABD 309.

Having considered all the evidence and all the circumstances of the case as well as submissions by Counsel, and, for the reason given above, I come to the conclusion that prohibition lies and shall be issued respecting the 1st, 3rd, 5th, 7th, 9th, 10th and 11th charges contained in the charge sheet Exh. "MB" annexed to the applicant's affidavit made on 6 November 1986. In relation to the 2nd, 4th, 6th and 8th charges contained in Exh. "MB", the relief sought is refused.

As to the costs, since both parties partially succeeded in the motion, I order that each party pays own costs.

Also found at [1988] 2 CLJ 863